APPENDIX.

Treasury Decision 39867 provides as follows:

To Collectors of Customs and Others Concerned:

"Treasury Department, November 20, 1923.

There is published below for the information of customs officers and others interested an Executive Order issued November 13, 1923, abolishing the ports of St. Albans, Swanton, and Highgate, and creating the port of St. Albans to include the townships of St. Albans, Swanton, Highgate, and Franklin, effective December 1, 1923:

Executive Order.

By virtue of the authority vested in me by the act of Congress approved August 1, 1914, making appropriations for the sundry civil expenses of the Government for the fiscal year ended June 30, 1915, the ports of St. Albans, Swanton, and Highgate in customs collection district No. 2 (Vermont), are hereby abolished, effective December 1, 1923.

By virtue of the same authority a new port of entry is hereby established which shall be known as the port of St. Albans, the headquarters port of customs collection district No. 2 (Vermont), and which shall comprise the townships of St. Albans, Swanton, Highgate, and Franklin, effective December 1, 1923.

CALVIN COOLIDGE.

The White House, November 13, 1923.

McKenzie Moss, Assistant Secretary."

APPENDIX.

CUSTOMS REGULATIONS, 1923.

ART. 395. EXAMINATION—COLLECTION OF DUTIES.—Personal and household effects not intended for sale, if accompanying a passenger, may be examined and passed on the pier regardless of value. No consular invoice is required. Merchandise, that is, articles not of a personal nature, or which are intended for sale, or were bought on commissions for others—valued at over $100 but less than $500, may be examined and appraised on the pier, if accompanied by a consular invoice. If not accompanied by a consular invoice, regular entry at the custom house and appraisement will be required. If the value of such merchandise exceeds $500, regular entry and appraisement must be made whether or not accompanied by a consular invoice.

Personal and household effects, including articles acquired abroad by returning residents, may be passed by inspectors without calling an examiner. If an inspector is in doubt as to character of articles, an examiner should be consulted.

Duties will be assessed on articles in passengers' baggage on the actual market value of such articles due allowance being made for depreciation through wear and use.

Collectors have discretionary power to remit duties not exceeding $2 on articles in passengers' baggage.

Receipts for duties on articles in passengers' baggage shall be given to the payor on Customs Form 6063 at comptroller ports, and at subcomptroller ports on Customs Form 5119.

Customs officers will not open baggage for the purpose of examination. Any baggage which is not opened by the owner or his agent for examination should be treated as unclaimed.

Commercial travelers' samples imported under the reciprocal agreement between this country and the United Kingdom of Great Britain and Ireland may be passed upon the dock in the same manner as passengers' baggage without formal entry, provided such samples are not valued at more than $500 and are accompanied by a descriptive list certified by an American consul. The descriptive list will be attached to the declaration and duties deposited or bond given for exportation.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,	
Petitioner	October Term 1938
v.	No. 669.
Leib Ritterman.	

SUPPLEMENTAL BRIEF FOR RESPONDENT.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,	)	
Petitioner	)	October Term 1926
v.	)	
Leib Pitterman.	)	No. 668.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

On pages 11 and 12 of respondent's brief reference is made to the reason which may have actuated Congress to change Section 3865 of the Revised Statutes by eliminating the words, "subject and duty" and "without paying and accounting for duty" from Section 593 (a) of the Tariff Act of 1922. It is the intention to state in this memorandum alternative reasons which may have actuated Congress to so do and to press the reason hereinafter set forth, rather than limit the discussion to the reasoning set forth in those pages of respondent's brief.

Page 11 of the respondent's brief should have included, after the italicized words at the end of the second paragraph the following:

"provided the words 'defraud the revenue' mean more than pecuniary loss."

Section 593 a contains four elements of the crime commonly described as smuggling; that is:

(1) Defraud the revenue

(2) Smuggle or clandestinely introduce

(3) Merchandise

(4) Which should have been invoiced;

while Section 2865 of the Revised Statutes under which Keck vs the United States was decided contained six elements of the crime of smuggling.

It is respondent's contention that the four elements in Section 593 a include all of the six elements set forth in Section 2865 of the Revised Statutes. If the congressional intent is to be judged from the law applicable from the decisions defining of these four elements.

"Defraud the Revenue" in the light of Haas vs Henkle 216 US 462, 479 (defining "defraud the United States") might have meant any interference with a governmental function and was not necessarily limited to the causing of pecuniary loss; but this Court 70 L Ed 249 in the United States vs Cohn, October Term, 1925, Case No. 130, held that the context of the statute containing the word "defraud" should be the determining factor in attaching to the word "defraud" its proper meaning. This doctrine, if carried to

its logical conclusion, would mean that "defraud and revenue" is confined to the causing of pecuniary loss to the Government by some act of deceit or chicanery. (See Peoples U.S. Bank Vs Goodwin 162 Federal 937; United States vs Norton 16 of Wallace 566, both of which define "revenue" in the words of Webster as: "The income of a nation derived from taxes, duties and other sources for the payment of national expenses." See also Encyclopaedia Britannica, 1911 edition, volume 33, page 323, defining revenue as "Income return or profit, more particularly the receipts from all sources of a government or state."

It may thus be concluded that there could be no defrauding of the revenue under 593 (a) unless it was such defrauding as caused pecuniary loss. Consequently, the only defrauding of the revenue which can occur by the introduction of merchandise in violation of law would be the loss of the duty, and a loss of duty presupposes the existence of a duty to which the goods are subject.

"Smuggled or clandestinely introduced" was defined in the case of Keck vs United States to be "The overt act of passing the goods through the lines of the customs authorities without paying or securing the duties" and this interpretation of the law was so stated in 24 opinions of the Attorney General, page 583 at 586.

F. 586

It is not necessary to dwell on the technical meaning of the word "importation" which is satisfied by arrival within the limits of a port of entry with intent to unlade. The ultimate purpose of all such prohibitions of importations is to prevent the actual introduction of the goods into the country, and the offense of smuggling is not complete, as we have seen, until the merchandise has been landed: that is, has actually crossed the line of the customs authorities. This clandestine introduction is prohibited by the gravest penal sanctions (SECS. 2865, 3082, R. S.)

It will thus be seen that the word "smuggle" or its interchangable expression, "clandestinely introduce", means the secret introduction of goods construed with an evasion of an obligation to pay the duty, and that such definition is complete without the words of Section 2865, "subject to duty or without paying or accounting for the duty" is apparent.

"Merchandise" was decided in the case of the United States vs Sischo, 262 US 165, to include prohibited merchandise. Consequently, no additional phraseology or omission of existing phraseology was necessary to indlude such prohibited merchandise within the terms of Section 593 a.

Further, Section 401 of the Tariff Act of 1922, par. "e", defines merchandise for the purposes of the Act as "goods, wares and chattels of every description and includes merchandise the importation of which is prohibited".

Free merchandise was not covered by Section 2865 of the Revised Statutes nor is it covered by Section 593 a of the Tariff Act of 1922, because of the obvious paradox in charging the smuggling free goods with an intent to defraud the revenue.

"Smuggle or clandestinely introduce" merchandise with intent to defraud the revenue includes, therefore, every case of articles covered by Section 2865 of the Revised Statutes, and in addition thereto, prohibited articles; and this renders unnecessary the inclusion of the words "subject to duty and without paying and accounting for the duty" as all articles which might be covered by these two clauses are already covered by the Statute 593 a as enacted.

This renders the doctrine of the Heck case applicable because the statutes are the same and the indictments in the two cases were the same and the facts in the two cases, up to a certain point, are identical.

The arrival of the steamship at the dock, in the Heck case, and the arrival of the international train at the station of St. Albans, Vermont, create identical legal situa-

tions. The limit of the territorial waters in the Keck case is identical with the international boundary line between Canada and the United States in the case at bar.

No machinery exists for the making of entry and the collection of duties on the ship approaching the dock and no legal machinery exists for the making of an entry and the paying of the duty on a train approaching the first point of entry in the United States-- which, in the case at bar, was St. Albans, Vermont.

The provisions of the Tariff Act of 1922; such as Sections 431 and 481 covering manifests, 481 to 498 inclusive dealing with entries, bills of lading, consular invoices, etc., and Section 499 and the sections dealing with examination and appraisal; all deal with merchandise in the ordinary meaning of the term and do not apply to baggage. (See United States vs Peral Necklace 111, Federal 165; United States vs One Purple Cloth Costume, 158 Federal 899; and United States vs One Pearl Chain, 139 Federal 510, affd. 513.)

If it be decided that articles in the baggage are to be treated the same as merchandise then they must be given the benefit of the merchandise provisions for entry and Section 484 of the Tariff Act of 1922, which provides that merchandise shall be entered "within 48 hours**** after the entry of the importing vessel or report of the vehicle",

no such period of time was granted to respondent. The merchandise or baggage, which ever it may be, was seized from the vehicle upon which it had arrived prior to the giving of any legal opportunity to respondent to make any kind of an entry.

If the diamonds be considered as articles in the baggage then Section 461, Section 482, Section 498 of the Tarrif Act of 1922 and Articles 205, 247 and 395 of the Customs regulations of 1923 control this transaction from its inception to its end; and nothing which happened, either in Canada or on the train where respondent was led to believe the invitation to declare included only articles on his person or in his small handbag which then accompanied him, or at the custom house at St. Albans, prior to the time when he was asked about his Gladstone bag, could be held to be any more than an attempt, unaccompanied by the overt act which, perhaps, respondent was prevented from committing by the illegal act of the customs authorities in seizing his bag before it had been landed within the customs lines at St. Albans.

A compliance with the law would not permit baggage to get out of the control of the customs authorities between Montreal and the first port of entry in the United States and it certainly did not get out of their control in the case at bar. These diamonds were not <u>discovered</u> by the customs

authorities. They were disclosed by the passenger during the course of his entry and before his examination was concluded.

The passengers baggage regulations having to do with passengers arriving on steamships and referred to above contemplate the giving to the passenger of a blank declaration and are as follows:

SECTION 496, TARIFF ACT OF 1922:

"EXAMINATION OF BAGGAGE" - The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefore has been made."

SECTION 497, TARIFF ACT OF 1922:

"FORFEITURE" - Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article".

CUSTOMS REGULATIONS, 1923:

"ART. 390. "DECLARATIONS AND ENTRIES. - Forms of baggage declaration and entry, Customs Form 6063, will be furnished by collectors to steamship companies for use on steamships carrying first and second class passengers, Customs Form 6061, will also be furnished for distribution on steamers.

Passengers should prepare and sign their declarations on board steamships at least one day before arrival and should hand them to the purser for delivery to the proper customs officer on arrival in port.

Failure to declare dutiable articles contained in baggage before examination of the baggage is begun subjects such articles to seizure and forfeiture and the passenger to a penalty equal to the value of such articles. When the collector is satisfied that the failure to declare any article was not with intent to evade the payment of duty he may permit the declaration to be amended.

The senior member of a family, if a passenger, may declare for the entire family, including servants traveling with them."

ARTICLE 392.

"PROCEDURE ON DOCK. - After the baggage has been landed and declaration signed and acknowledged before

a customs officer it will be examined by a customs inspector and released upon the payment of such duties as may be found due. The examination of any baggage may be postponed and the baggage sent to the appraisers' stores or in bond to another port at the request of the passenger.

When all or any part of the passenger's baggage is detained for further examination a receipt therefor will be given on Customs Form 6051."

These regulations, however, do not apply to the introduction of baggage or articles therein or articles contained on the person arriving from contiguous territory.

Section 498 of the Tariff Act of 1932 has recognized the distinction between personal effects and articles carried on the person or contained in the baggage or persons arriving in the United States. Sub-section 4 of that section provides for household effects used abroad and personal effects, not imported in pursuance of a purchase or agreement for purchase and not intended for sale.

Sub-section 6 of that section provides for articles carried on the person or contained in the baggage of a person arriving in the United States.

This differentiation has been followed in Article 347 of the Treasury Regulations 1933, promulgated there-

under. In Section D. sub-section 4 of Article 347, it is provided it is provided for household effect used abroad and personal effects not imported in pursuance of a purchase or agreement for purchase and not intended for sale; and sub-section 6 provides for articles carried on the person or contained in the baggage of a person arriving in the United States.

The Government form set forth in the Appendix of the Government's brief refers specifically to sub-section 4 as mentioned in the above provisions of the Tariff Act and also to sub-section 4 of article 347.

Obviously, therefore, it is not intended that consular invoices should be required for articles carried on the person or in the baggage, as they are specifically exempted under Section 6, and as the form referred to by the Government applies only to personal effects it is not therefore improbable or unreasonalbe to assume that Congress had provided for the different method importation and examination in the goods of the class at bar carried in the baggage of passengers and subject to the scrutiny of government officers.

Moreover, no blank declaration on any customs form was given to respondent nor even mentioned to him.

hat might have happened had this baggage gone through without any suspicion or knowledge of the presence of dutiable merchandise or seizure by the customs authorities is beside the point. We are here concerned with a set of facts for which respondent was indicted under a criminal statute and the question is what actually happened, not what might have happened. Whatever bearing that might have had on respondent's intent, we contend that what he actually did constituted only an attempt to smuggle not accompanied by the commission of the overt act necessary to constitute the crime set forth in Section 593 a. As the Circuit Court of Appeals said (R. 79), whatever may have been respondent's responsibility under other statutes is not before us.

Respectfully submitted.

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